PRIVY COUNCIL REPORT

[PRIVY COUNCIL.]
(Appeal from the Supreme Court of the Federated Malay States.)
LORD RUSSELL OF KILLOWEN, LORD ROCHE & SIR LANCELOT SANDERSON.
July 19, 1937.

RICHARD PHILLIP PHILLIPS & OTHERS .....Appellants.
vs.
WILLIAM FRANCIS BARNS.....Respondent.

Principal and agent—money entrusted to agent for investment—loss—breach of duty—extent of agent's liability.

The plaintiff gave a power of attorney to the defendants enabling them to manage and invest money entrusted to them by him. The money was invested by the defendants in "brokers' loans" or "carrying transactions," in accordance with an arrangement between the parties. The defendants made loans to debtors through brokers. Business was good for some time. Owing to the world depression one of the brokers made default in paying interest. The plaintiff was informed of the situation but the defendants expressed the opinion that if time were given the broker would improve in his position; the plaintiff did not differ in this opinion. Later, the plaintiff wrote to the defendants that they should sell the defaulted scrip as and when they thought it best to do. The market, however, grew worse and the broker became bankrupt. The shares were afterwards realised and the realisation resulted in loss to the plaintiff. Not being satisfied with his affairs, the plaintiff went out to Ipoh, the defendants' place, to investigate the matter for himself and thereby incurred an expense of $2,500. The plaintiff filed a suit claiming damages for negligence and breach of duty in not informing him of the situation earlier. No fraud was alleged.

Held, that the defendants' conduct was inexcusable and a breach of duty, notwithstanding the fact that the motives of the defendants were untainted with fraud. Business duty and the statutory recognition of it required of them that they should tell the plaintiff truly all the facts as to his affairs and they did not do so. In these circumstances it is not unnatural that the plaintiff failed through Solicitors to unravel the facts as to his affairs and went to Ipoh to try to find out the true position. Though the power of attorney gave the defendants authority to act without instructions, it did not relieve them from a business obligation enforced by statute to give to the plaintiff correct and timely information.

Held, nevertheless, that upon information given earlier and more adequately than it was given, the plaintiff would have done precisely what the defendants did and with the same result; all the more because the defendants would have been bound in duty to express their own opinion and upon the expression of that opinion, that the plaintiff would have fallen in with a view which coincided with that which he formed for himself when he knew all the facts that mattered for a decision. The only thing to do was either to sell the shares against the brokers or to give time. The defendants did the latter and the plaintiff would have done the same if it had been left to him and consequently the defendants were not liable for the loss resulting on the sale of the shares.

APPEAL from an order of the Court of Appeal of the Federated Malay States dated 8th October, 1935.

R. P. Croom Johnson, K.C., M.P., and *Valentine Holmes*, for the Appellants.

F. P. M. Schiller, K.C., and *H. G. Robertson*, for the Respondents.

Cur. Ad. Vult.

The judgment of the Board was delivered by—

LORD ROCHE.—This is an appeal from an order of the Court of Appeal for the Federated Malay States dated 8th October, 1935, (Mr. Justice Burton, Mr. Justice Terrell, The Chief Justice Sir Samuel Thomas dissenting), allowing an appeal by the respondent (the plaintinff in the action) from a judgment of the Supreme Court (Mr. Justice Howes) dated 11th May, 1935, dismissing the plaintiff's action with costs.

The nature and course of the proceedings was as follows:—In the year 1925 the plaintiff, a retired merchant and planter, in the State of Perak, when about to leave Perak to reside in Europe, entrusted certain of his monies available for investment to the management of the defendants, who are accountants at Ipoh in Perak and elsewhere and gave them a power of attorney for the purposes of such management. Loss of capital having been sustained by the plaintiff in connection with the employment of his monies in 1929 and the following years the plaintiff on 1st May, 1934, filed a plaint, which was amended on 16th August, 1934, claiming damages from the defendants for negligence and breach of duty. The action was tried in March and April, 1935, and on 11th May, 1935, Howes J. delivered judgment dismissing the action. The appeal was heard in August, 1935. During the hearing of the appeal an amendment of the plaint was allowed. The judgment of the Court delivered on 8th October, 1935, allowed the appeal and awarded the plaintiff a sum of $2,500, representing certain expenses incurred by the plaintiff and specifically claimed as damages, and as to the main claim for damages ordered an inquiry by the Registrar which was duly held. On 3rd January, 1936, the Registrar certified that the amount of damages (exclusive of the above-mentioned sum of $2,500) was $36,147.26. The ground upon which the majority of the Court held that the plaintiff was entitled to the account resulting in the Registrar's certificate for the amount other than the $2,500 was first raised as a ground for the claim to this larger relief in the amendment made during the hearing in the Court of Appeal. The Chief Justice dissented from the view of the majority and agreed with the trial Judge that the action should be dismissed.

The facts material to the decision of the case are these:—The plaintiff left Ipoh in June, 1925, after giving the power of attorney dated 4th April, 1925; but before that date the particular employment of the plaintiff's funds which subsequently gave rise to trouble and loss had been discussed between the parties and arranged for. Such employment was in what have been called "brokers' loans" or "carrying transactions." Their nature was this: There is no stock exchange in Perak, but stockbrokers who require funds in repect of the purchase of shares for forward settlement—mainly those of rubber and tin producing and industrial companies—procure loans upon certain customary terms. The most important of these terms is that the loans are made against or in respect of specific shares approved by the lender or his agents, certificates for which are deposited with them accompanied by a blank transfer. On a monthly transaction which was the period adopted in the dealings now in question, there are passed two contracts, under the first of which at the beginning of the month the shares are sold by the brokers to the lender for the amount of the loan made, representing the value of stocks and shares less a margin of 10 per cent., and under the second of which the same shares are re-purchased by the brokers at the end of the month for an amount increased by the interest on the loan, usually 1 per cent. for the month's accommodation. If the borrower desires to redeem any shares during any month he can do so on paying a sum equal to their value or depositing other shares agreed upon of the like value. At the end of the month the particular transaction would be at an end, but another similar transaction might be entered into in respect of the same or other shares and so on from month to month. There were other methods availed of for the employment of the plaintiff's funds such as mortgages and other secured loans; but the transactions above described, which will for convenience be called brokers' loans throughout, are the only ones which gave rise to any serious trouble and they alone were in question in this action.

Business was good from 1925 to the autumn of 1929 and substantial business was done by the defendants for the plaintiff as well as for other clients with three firms of brokers, Whitaker & Co., Botly & Co., and Macphail & Co., Ltd., and the quarterly accounts rendered by the defendants to the plaintiff show that at the end of 1929 over $80,000 of the plaintiff's funds were thus employed. The continuous employment of such an amount was not always possible, but the annual return on this part of the plaintiff's funds seems to have been about 10 per cent. per annum. At the end of 1929 the change in business conditions which subsequently developed into a world-wide depression of great intensity reached Ipoh. Quite at the end of November and at the beginning of December Whitaker & Co. became unable to take up and pay for the shares due to be taken up and paid for under contracts due for performance on 27th and 28th November and 4th and 5th December, 1929. The capital sum then outstanding for which they were liable was $46,500. They were, however, able to pay their interest and the defendants determined that the best course was to give these brokers time and renew the contracts. Whitakers' difficulty was said to have been chiefly due to one particular client who was unable to implement his obligations to them, which were large. It was hoped that the market conditions would improve and that the difficulties would be surmounted. The contrary, however, proved to be the case, and at the end of April, 1930, Whitakers fell into default in payment of their interest. Share values had declined instead of recovering and their client was still in default to them. Up to this time the defendants had not informed the plaintiff of the situation which had arisen and did not do so until 3rd July, 1930, when they sent him his quarterly account up to 30th June, 1930. They then informed him that the loans to Whitakers were not secured and that there was a default in interest. They also informed him that the margin of security for loans to Botly & Co., was somewhat short but that this firm had kept up interest payments. They expressed themselves as hopeful that the extension of time granted to Whitakers might enable them to improve their position and that provided no action was taken by their bank the matter would ultimately right itself. The delay in the giving of information and the sparseness of the information when given was made a ground of complaint in the action and must be subsequently discussed. The plaintiff in reply to the defendants' communication expressed the opinion that in view of the severe slump some sort of crisis was not entirely unexpected; but as it seemed that bottom had been reached and matters were slightly on the mend he thought with the defendants that the matter would ultimately right itself. The market, however, went worse instead of better, and while Botly & Co., after falling into arrears with their interest got through their difficulties in time and Macphail remained sound and paid in full after requiring and being granted some extensions of time, Whitaker & Co. became bankrupt in July of 1932. The plaintiff in May of that year, by letter of 6th May, 1932, had expressed himself as worried that the defendants did not appear to consider the advisability of selling defaulted scrip, and though he thought immediate realisation might be unwise he told the defendants to be alert to sell as and when they thought it best to do so. When the realisation was completed the loss

amounted to the sum certified in the Registrar's certificate. But before this loss had become established by realisation, correspondence took place between the parties, and the plaintiff then took the point of view that he was entitled as of right and as a matter of law to the realisation of the shares immediately on default. In 1933 the plaintiff, not being satisfied as to his affairs and with the investigation of them conducted by solicitors in Perak whom he had instructed, went out himself and by so doing incurred the expenses amounting to $2,500 claimed in this action. He saw Mr. Brown of the defendant firm, who was then in charge of the business. Mr. Stewart the partner, who had generally managed the plaintiff's affairs had been away for a long time in New Zealand in 1931 and 1932 and had by this time in 1933 retired altogether and was living in Scotland. The shares unrealised or not already taken over by the plaintiff were handed over to him in March, 1934. On 1st May, 1934, this action was begun.

The amended plaint upon which the action was tried was framed on the basis that before the defendants were employed by the plaintiff specific terms had been orally agreed between the parties containing four essential conditions upon which business was to be done and that the defendants were guilty of breach of duty in entering into transactions with Whitakers which did not comply with these essential conditions. One of the essentials alleged was that privity should be created between the lender and the broker's client or that at any rate there should be in every transaction a client behind the broker. Alternatively on this part of the case negligence was alleged in the conduct of the business and in particular in the failure to realise the shares. There was also a subsidiary and independent claim for the $2,500 expenses based upon failure to give proper information in due time and upon the giving of false information. Fraud was not alleged and in the course of his evidence at the trial the plaintiff expressly disclaimed any intention to charge fraud. The contracts referred to in the particulars of the plaint as the contracts complained of were those last entered into with Whitakers, dated 27th and 28th April, 4th and 5th May, 1930. They were in fact the last renewals of identical contracts dated 27th and 28th November and 4th and 5th December, 1929, and were the result of the monthly giving of time down to the default of Whitakers in their interest payments. Inasmuch as the whole matter was investigated at the trial on the basis that there were such renewals and was dealt with by the trial Judge in his judgment on the same basis, their Lordships are not disposed to find any fault with the allowance by the Court of Appeal of the amendment in an additional paragraph 12 (*a*) which in substance put the plaint in order as regards this matter of dates. But the amendment also contained a concluding sentence as to non-compliance with section 214 of the Contract Enactment which will require further consideration.

In his judgment the trial Judge found that it was not established that there was a collateral or any agreement between the parties laying down the four conditions called essentials. He found that the defendants, against whom there was no suggestion that they were fraudulent or stood to derive any profit from the course they pursued, used their discretion in giving time and in not earlier realising the securities to the best of their judgment and without negligence or breach of duty. He found serious fault with the defendants in respect of the information they gave and failed to give, and he thought their conduct in this respect was discourteous to a degree and to his mind inexcusable. He did not specifically deal with the claim for $2,500, but as to the failure to give information he referred to section 214 of the Contract Enactment which provides:—"It is the duty of an agent in cases of difficulty to use all reasonable diligence in communicating with his principal and in seeking to obtain his instructions," and he held that the only thing that saved the defendants from legal liability under the section was the wide discretion given to them by the power of attorney. Accordingly judgment was given dismissing the plaintiff's claim.

In the Court of Appeal the further amendment was allowed of the tenour previously stated. But inasmuch as the majority of the Court in substance based their judgment in respect of the main part of the claim upon matter raised by the last sentence of the amendment, the sentence in question should be quoted. It reads "The plaintiff . . . in addition alleges that the defendants failed and neglected to comply with section 214 of the Contract Enactment." The effect of this was in some way to connect failure to give information with the major loss complained of and not as in the plaint as it before stood to connect it solely with the claim for the $2,500.

Up to a certain point the Court of Appeal was unanimous. Thus there was no dissent from the trial Judge's finding that no agreement as to the four essentials was established or from his finding that the defendants were not guilty of breach of duty or negligence in giving time to Whitakers and in not selling the shares. Both these matters upon which there was agreement in the Courts below have been raised anew in the arguments for the appellants before this Board but their Lordships see no reason for interference

with concurrent findings of fact supported by ample evidence and as it appears to their Lordships by the probabilities of the case. It remains, therefore, to consider the matter upon which the majority of the Court of Appeal gave their decision. This matter was the failure to give timely and proper information and in that respect to comply with section 214 of the Contract Enactment. The Chief Justice, though he thought that the defendants rightly incurred the censures which the trial Judge passed upon them, did not expressly say whether he thought there was a breach of the statutory duty annexed to the defendants' contract of employment. He did not refer to the $2,500 claim and as to the rest of the claim for loss in realization of the shares he thought the plaintiff, if told, would have acted as the defendants acted and therefore had established no claim to damages. Burton and Terrell JJ. found that there was a breach of duty under section 214 and that both the loss on the shares and the expenditure—of the $2,500—resulted from the defendants' conduct in that regard or, as it would be more correct to say with regard to the loss on the shares, they held that such loss must in the circumstances be presumed to have resulted from the defendants' conduct. The plain fact is that the learned Judges, forming a very bad opinion of the defendants' conduct, particularly that of Mr. Stewart, used language which amounted to a finding of the fraud which had never been alleged and had been expressly disclaimed by the plaintiff. They accordingly made an order as to damages which could have been justified, if at all, only on allegation and proof of fraud.

Before this head of damages is discussed further the minor head of damage, the claim for $2,500, can be shortly disposed of. Their Lordships are of opinion that the defendants' conduct, though explicable without reference to fraud was inexcusable and a breach of their duty. It may well be that the whole reason for it in the first instance was that it was thought both unnecessary and undesirable to trouble the plaintiff in Europe with matters that might mend themselves; but when this stage was past the defendants were still silent for some months and thereafter were uncandid and untruthful, as their Lordships can only suppose, because they wanted to shield their own conduct of affairs from criticism and censure. But that the motives of the defendants were untainted by fraud does not make their conduct any the less a breach of their duty. Business duty and the statutory recognition of it both required of them that they should tell the plaintiff truly all the facts as to his affairs and they did not do so. In these circumstances it is not unnatural that the plaintiff failed through solicitors to unravel the facts as to his affairs and went to Ipoh to try to get to the bottom of the story. Their Lordships, therefore, think that the Court of Appeal's judgment was correct in so far as it awarded the plaintiff the sum of $2,500 expended by him in connection with his visit to Ipoh. The answer to the claim which was made by the trial Judge, based on the terms of the power of attorney, seems to their Lordships not to be well founded. The power of attorney gave to the defendants authority to act without instructions; but it did not relieve them from a business obligation enforced by statute to give to the plaintiff correct and timely information as to his affairs.

As regards the other and more substantial portion of the claim: the order of the Court of Appeal gives the plaintiff his whole loss based on the difference between the amount invested on 30th November, 1929, and the amount realised with interest thereon from 30th November, 1929. On any possible view of the pleadings and facts it seems clear that this basis is erroneous and cannot be supported. Giving the most liberal interpretation to the last sentence of the amendment in the new paragraph (12a) of the plaint it cannot import more than allegations that but for the defendants' failure to comply with section 214 the plaintiff would and could have realised the shares for such and such a sum more than they in fact realised. Such an interpretation may well be more liberal than is warranted by the rules of pleading; but even assuming, as their Lordships will assume, that this interpretation is to be placed upon the pleading, it remains to consider whether the allegations are made out. The matter is singularly bare of direct evidence and small wonder as it was never raised until the evidence was closed and the matter was before the Court of Appeal. But there were the plaintiff's letters and in their Lordships' opinion those are fatal to the plaintiff's claim on this head. On a careful consideration of the matter their Lordships are impelled to the conclusion that further information or information at a different time would have made no difference to the plaintiff's action. When he knew of deficiency in security he took, until a late stage, the attitude that he would not interfere with the defendants' exercise of their discretion and never at any material date suggested an earlier realization of shares. The conclusion at which their Lordships have arrived is that upon information given earlier and more adequately than it was given, the plaintiff would have done precisely what the defendants did and with the same result: all the more because the defendants would have been bound in duty to express their own opinion. There can be no doubt what the defendants' opinion was because they acted upon it; and upon the expression of that opinion, their Lordships

cannot doubt but that the plaintiff would have fallen in with a view which coincided with that which he formed for himself when the knew all the facts that mattered for a decision. The point which he took later in his correspondence, that the shares never ought to have been taken over or left unrealised at all because the brokers were under contract to buy them, is a different point altogether. He was, of course, right that the brokers were bound to buy; but they had not the money to do so and the defendants had not either the duty or the power to make them do the impossible. The only thing to do was either to sell the shares against the brokers or to give time. The defendants did the latter and no Court has held them to be wrong in so doing. It is because their Lordships have arrived at the conclusion that the plaintiff would have done the same if it had been left to him that they are impelled to allow this appeal so far as the order appealed from results in an award of damages beyond the $2,500.

Their Lordships will therefore humbly advise His Majesty that to this extent the appeal should be allowed and that the order of the Court of Appeal should be varied accordingly. As to costs it is plain that the plaintiff has attained a very partial success in the litigation and to avoid a difficult taxation of issues their Lordships are of opinion that the proper order as to costs is as follows: The plaintiff should recover from the defendants one-quarter of his costs of action and trial in the Court of first instance including the costs of the commission but not including any costs of the enquiry before the Registrar: as to the costs of the appeal to the Court of Appeal each party should pay its own costs: as to the appeal to His Majesty in Council the plaintiff should pay to the defendants three-quarters of their costs: there should be a set-off of costs and damages and any sum overpaid by a party should be repaid: save as above directed each party should pay its own costs.

Appeal partly allowed.

Solicitor for the Appellants—

Mr. William Charles Crocker.

Solicitors for the Respondent—

Messrs. Petch & Co